Supreme Court, U.S.
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No. 07-529

IN THE

United States Supreme Court

RANDOLPH GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, after *United States v. Booker*, 543 U.S. 220 (2005), a court of appeals must evaluate a district court's decision to adhere to a previously imposed sentence for the substantive reasonableness of the undisturbed sentence, not merely the district court's understanding of the scope of its discretion under *Booker*.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 4

I. THE DECISION BELOW CONFLICTS WITH THE MAJORITY OF FEDERAL COURTS OF APPEALS TO HAVE CONSIDERED POST-*BOOKER* REASONABLENESS REVIEW 5

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *BOOKER* AND *RITA* 7

CONCLUSION 10

APPENDIX

The Ninth Circuit Memorandum Opinion Affirming Reimposition of Sentence 1a

The District Court's Reimposition of Sentence (Excerpted) 3a

The Ninth Circuit's Affirmation of George's Conviction and Remand on Sentencing 5a

The District Court's Conviction and Sentencing (Excerpted) 24a

TABLE OF CONTENTS – continued

Page

The Ninth Circuit Order Denying Rehearing on Affirmation of Reimposition of Sentence 26a
The District Court Order Stipulating to the Base Offense Level Under the Sentencing Guidelines 27a
18 USC Section 3553(a) 29a
26 USC Section 7203 ..... 32a
26 USC Section 7206 ..... 33a

TABLE OF AUTHORITIES

Page

Cases

United States v. George,
420 F.3d 991 (9th Cir. 2006) 1, 3, 4

Blakely v. Washington,
542 U.S. 296 (2004) 2

Rita v. United States,
127 S. Ct. 2456 (2007) 7, 8

United States v. Ameline,
409 F.3d 1073 (9th Cir. 2005) 2, 3

United States v. Booker,
543 U.S. 220 (2005) ..... *passim*

United States v. Combs,
470 F.3d 1294 (9th Cir. 2006) ..... *passim*

United States v. Hughes,
401 F.3d 540 (4th Cir. 2005) 6

United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 6

United States v. Robinson, --- F.3d ---, 2007 WL
2780499 (6th Cir. 2007) 6

United States v. Williams,
425 F.3d 478 (7th Cir. 2005) 6

United States v. Williams,
475 F.3d 468 (2d Cir. 2007) 6

TABLE OF AUTHORITIES – continued

Page(s)

Statutes

28 U.S.C. § 1254 1

18 U.S.C. § 3553(a) 3, 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Randolph George, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The most recent opinion of the court of appeals was not selected for publication in the Federal Reporter, but is available at 226 Fed. Appx. 771 (No. 06-10275) and is reproduced in the Appendix (at 1a) to this petition. The 2005 opinion of the court of appeals is reported at 420 F.3d 991 and is reproduced in the Appendix (at 5a).

JURISDICTION

The Ninth Circuit denied Mr. George's timely appeal on March 30, 2007, and denied his petition for rehearing en banc on July 2, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions involved are contained in the Appendix at 25a.

STATEMENT

This case involves a criminal conviction for filing false tax returns, the sentence imposed as a result of this conviction, and the Ninth Circuit's failure to review the substantive reasonableness of the sentence after it was reimposed in the wake of this Court's decision in *United States v. Booker*.

On November 13, 2002, Randolph George was convicted by a jury of two counts of filing false federal tax returns for 1991 and 1992, and one count of failure to file for 1993. During a subsequent hearing on tax loss, the district court determined that the government could establish relevant conduct by a preponderance for the purposes of sentencing. The parties then entered into a written stipulation regarding tax loss, reserving Mr. George's right to appeal from the district court's relevant conduct rulings ("underlying rulings"), and conditioning the validity and effect of the stipulation on the affirmance of the district court's underlying rulings by the Ninth Circuit. Pet. App. 24a.

After denying a motion for downward departure for extraordinary family circumstances, and based on the parties' stipulation, the district court applied the then-mandatory U.S. Sentencing Guidelines and sentenced Mr. George to fifteen months' imprisonment, a $20,000 fine, a $125 special assessment, and $70,000 in restitution. Pet. App. 21a-22a. Mr. George appealed the conviction and sentence to the Ninth Circuit challenging, *inter alia*, the district court's underlying rulings.

While Mr. George's appeal was pending, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), striking down Washington State's sentencing law, and *United States v. Booker*, 543 U.S. 220 (2005), invalidating the "mandatory" portions of the U.S. Sentencing Guidelines. In the wake of these decisions, the Ninth Circuit decided *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*), which provided for a limited remand where "it is not possible to reliably determine from the record

whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory." *Ameline*, 409 F.3d at 1084.

On August 23, 2005, the Ninth Circuit affirmed Mr. George's conviction, finding no Sixth Amendment violation in light of the parties' stipulation, but remanded to the district court to review the sentence in accordance with *Ameline*. *United States v. George*, 420 F.3d 991, 1001-02 (9th Cir. 2006). The Ninth Circuit did not address the validity of the district court's underlying rulings. *Id.* Mr. George's petition for rehearing requesting consideration of the conditional nature of the stipulation was denied on January 16, 2006, without discussion.

At the hearing on remand on April 12, 2006, Mr. George argued that, because the Ninth Circuit failed to address the district court's underlying rulings, the conditional stipulation could not constitute an admission as to tax loss and, as such, there was nothing upon which to base his 15- month sentence. Relying on the law of the case doctrine, and finding that the Ninth Circuit affirmed its underlying rulings, the district court refused to substantively address Mr. George's arguments. The district court next addressed the factors under 18 U.S.C. § 3553(a), in particular, Mr. George's family circumstances. Though acknowledging the gravity of George's family circumstances, the district court considered a factor it had not previously considered in the original sentencing – Mr. George's purportedly false testimony at trial – to impose the same sentence originally imposed. Mr. George timely appealed.

On December 18, 2006, the Ninth Circuit issued an opinion in *United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006), holding that its review following an *Ameline* remand is limited to "[w]hether the district judge properly understood the full scope of [her] discretion in a post-*Booker* world." *Id.* 470 F.3d at 1297. On March 9, 2007, the Defendant-Appellant in *Combs* filed a Petition for Panel Rehearing or Rehearing *En Banc*.

On March 30, 2007, in reliance on the *Combs* decision, the Ninth Circuit affirmed the district court's determination to retain the pre-*Booker* sentence imposed on Mr. George. Pet. App. 1a. On July 2, 2007, the Ninth Circuit denied Mr. George's Petition for Panel Rehearing or Rehearing *En Banc*. On July 9, 2007, the Ninth Circuit denied the Petition for Panel Rehearing or Rehearing *En Banc* in the *Combs* case.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit created an intercircuit split and contravened this Court's clear precedent when it held that it would review a district court's decision to retain a sentence originally imposed pre-*Booker* only to ensure that the district court understood the scope of its discretion post-*Booker*.

This Court made clear in *Booker* that federal criminal sentences were to be reviewed by the appellate courts for reasonableness, 543 U.S. at 260-61, and that this reasonableness standard was to be applied in all cases that were pending on direct review at the time *Booker* was decided, *id.* at 268. A majority of the circuit courts that have considered the is-

sue has held that such reasonableness review requires that, if a district court elects on post-*Booker* remand to adhere to the originally imposed sentence, the appellate court will review the sentence for substantive reasonableness. In contrast, the Ninth Circuit's opinion below, applying its decision in *United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006), defined *Booker*'s prescribed reasonableness review so narrowly as to render it devoid of any real meaning, thus denying defendants like Mr. George any opportunity for meaningful appellate review of their sentences.

In addition, the Ninth Circuit's purported "reasonableness" review explicitly sets up different schemes of appellate review for defendants who challenged the reasonableness of their sentences during their first appeal and those who did not. *Booker* does not make this distinction, nor does the majority of the circuit courts that has addressed the question of limited remands for compliance with *Booker*. Because of the intercircuit conflicts created by the Ninth Circuit's decision below—not to mention conflicts with this Court's precedent—certiorari is warranted in this case.

I. THE DECISION BELOW CONFLICTS WITH THE MAJORITY OF FEDERAL COURTS OF APPEALS TO HAVE CONSIDERED POST-*BOOKER* REASONABLENESS REVIEW.

The Ninth Circuit's decision below (which followed its earlier decision in *Combs*) is out of line with the majority of the circuits to have considered the scope of reasonableness review post-*Booker*. Indeed, the Second Circuit, considering the current

state of circuit precedent, singled out the Ninth Circuit's decision in *Combs* as out of step with the majority of circuit court decisions to consider the issue. *United States v. Williams*, 475 F.3d 468 (2d Cir. 2007) (applying full substantive reasonableness review). The Seventh Circuit has joined the Second Circuit in applying a reasonableness review that inquires into both the procedure whereby the original sentence was retained and the substance of the reimposed sentence. *See United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Williams*, 425 F.3d 478 (7th Cir. 2005). *See also United States v. Robinson*, --- F.3d ---, 2007 WL 2780499 (6th Cir. 2007) (applying reasonableness review after *Booker*); *United States v. Hughes*, 401 F.3d 540, 546-47 (4th Cir. 2005) (same).

In particular, the Second Circuit, in "consider[ing] the scope of [the court's] review of a district court's decision not to resentence pursuant to" a limited remand, *Williams*, 475 F.3d at 471, concluded that it retained "authority to review for reasonableness both the procedure whereby the District Court decided not to resentence and the substance of the undisturbed sentence." *Id.*

Similarly, the Seventh Circuit held that a district court's decision not to modify its original sentence on post-*Booker* remand would be affirmed "against a plain-error challenge [only] provided that the sentence is reasonable. . . . [T]he mere reimposition of the original sentence does not insulate from appellate review under the new [*Booker*] standard." *Paladino*, 401 F.3d at 484.

Certiorari is warranted in this case to resolve this split among the federal circuits regarding the proper

scope of reasonableness review to be applied when the district court decides on post-*Booker* remand to adhere to its originally imposed sentence.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *BOOKER* AND *RITA*.

This Court's decision in *Booker* struck down the federal sentencing guidelines created by the Sentencing Reform Act of 1984 to the extent that these guidelines mandated the imposition of sentences based on facts found not by a jury, but by a judge. *Booker* severed the mandatory provisions of the sentencing guidelines to render the remaining sentencing provisions advisory. *Booker* further held that the courts of appeals must apply a "reasonableness" standard of review to sentences under the new regime. 543 U.S. at 260-61. This Court explained that such a reasonableness standard was practical and familiar to courts applying sentencing law. *Id.* at 262.

This Court further explained post-*Booker* reasonableness review in *Rita v. United States*, 127 S.Ct. 2456 (2007). *Rita* held that federal appellate courts may apply a presumption of reasonableness to district court sentences that are within the properly calculated sentencing ranges. *Id.* at 2459. The Court emphasized that the presumption of reasonableness was not binding, *id.* at 2463, and that the courts of appeals would continue to determine the reasonableness of the district court's sentence, *id.* at 2464.

Despite the fact that this Court has required that an appellate court look to the reasonableness of the post-*Booker* sentence, the Ninth Circuit has inter-

preted "reasonableness" review in a manner that defies common sense understanding of the word and conflicts with this Court's precedent.

The Ninth Circuit in *Combs*, 470 F.3d at 1294, held that it would review a district court's decision to adhere to the original pre-*Booker* sentence only to determine whether the district court understood the full scope of its discretion after *Booker*. It would not inquire into whether the length of sentence was reasonable. It would not inquire into whether the appropriate factors were considered under 18 U.S.C. § 3553(a), which instructs the sentencing judge to consider, *inter alia*, offense and offender characteristics and whether the sentence is greater than necessary to comply with the purposes of sentencing. The Ninth Circuit applied *Combs* in this case and refused to apply any substantive reasonableness review, thus denying Mr. George any substantive appellate review of his sentence.

The Ninth Circuit's approach in this case conflicts with the plain language of this Court's decision in *Booker*, which expressly stated that reasonableness review will apply to all cases pending on appeal; it also conflicts with *Rita*'s articulation of a non-binding appellate presumption of reasonableness, which plainly implies that some sort of substantive reasonableness analysis must occur at the appellate level. Here, by looking only to whether the district court understood the full scope of its post-*Booker* discretion, the Ninth Circuit has abandoned any meaningful reasonableness review.

In addition, the Ninth Circuit in this case and in *Combs* has imposed a reasonableness review that differs for those defendants who challenged the reason-

ableness of their sentence on appeal in the first instance, as opposed to those defendants who did not raise such an initial challenge. This Court in *Booker* never made such a distinction. *See Combs*, 470 F.3d at 1299 (Berzon, J., dissenting) (noting that the *Combs* majority was drawing an unauthorized distinction between those who questioned the reasonableness of their sentences on appeal, and those, like Combs, who did not).

Certiorari is warranted in this case because the Ninth Circuit's decision below and in *Combs* not only has created an intercircuit split, but is also in conflict with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Randolph GEORGE,

Defendant-Appellant.

No. 06-10275

March 30, 2007.

MEMORANDUM OPINION*

Before: HUG, BRUNETTI, and W. FLETCHER, Circuit Judges.

Appellant Randolph George was convicted in federal court for filing false tax returns and failure to file a return. After sentencing, he appealed to the Ninth Circuit challenging his conviction and sentence. The Ninth Circuit affirmed his conviction but remanded to the district court to review the sentence in accordance with United States v. Ameline, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). See United States v. George, 420 F.3d 991, 1002 (9th Cir. 2005). Under Ameline, the remand focuses on "whether the

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

sentence imposed would have been materially different had the district court known that the [U.S. Sentencing] Guidelines were advisory." Ameline, 409 F.3d at 1084. Judge Chesney concluded she would have imposed the same sentence. We hold that United States v. Combs, 470 F.3d 1294 (9th Cir. 2006), applies, and affirm.

Because Judge Chesney determined she would have imposed the same sentence after United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), our review is limited to "[w]hether the district judge properly understood the full scope of [her] discretion in a post- Booker world." Combs, 470 F.3d at 1297. During the Ameline remand hearing she stated, "The purpose is to determine at this time whether the court would impose or should impose a sentence in some significant way different from the sentence that was imposed earlier . . . . I think I made clear-if I need to say so-I want to make clear that I won't consider the guidelines calculations to be presumptive. The Guidelines are a factor. . . ." We hold that Judge Chesney understood her discretionary powers under an advisory Guidelines system and hold that her decision to retain the original sentence was reasonable. Combs, 470 F.3d at 1297. AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RANDOLPH GEORGE,
Defendant

No. CR 01-00326
April 12, 2006

BEFORE THE HONORABLE MAXINE M. CHESNEY
UNITED STATES DISTRICT COURT JUDGE

REPORTED BY: JUANITA GONZALEZ
CSR NO. 3003

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THE COURT: Then the Court having found that the sentence as originally imposed is reasonable under the current state of the law and one that the Court feels is appropriate, is not prepared to change. The Defendant has the right to appeal. The Defendant may

remain out of custody pending resolution of that appeal. He remains under whatever the conditions were that were imposed earlier prior to the time of judgment was originally imposed. He has apparently complied in all respects with those conditions.

That will conclude the proceedings.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

04-10307

UNITED STATES of America,

Plaintiff-Appellee,

v.

Randolph GEORGE,

Defendant-Appellant.

DECIDED: August 23, 2005.

Before: LAY,* B. FLETCHER, and HAWKINS,
Circuit Judges.

LAY, Circuit Judge.

Randolph George was convicted by a jury on two felony counts of willful filing of false tax returns in violation of 26 U.S.C. § 7206(1), and one misdemeanor count of willful failure to file a tax return in violation of 26 U.S.C. § 7203. The district court sentenced George to fifteen months of imprisonment for the false returns, twelve months for failure to file (to run concurrently), and one year of supervised release. Additionally, the district court ordered George to pay

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

$70,000 in restitution, a $20,000 fine, and $125 in special assessments. We affirm.

I. Background

This case presents two key issues: First, are receivership[1] FN1 fees paid to a cash-basis taxpayer taxable in the year received even though they are subject to subsequent court review and possible disgorgement? Assuming they are, was the law on this point sufficiently clear to allow a criminal prosecution of George for failure to report this income? We answer both questions in the affirmative.

During 1991, 1992, and 1993, George was affiliated with Media Venture Partnership, which brokered the sale of radio stations and, through its affiliate Media Venture Management, Inc., handled court-appointed receiverships for financially troubled radio stations being sold off to satisfy debts owed to the stations' creditors. Because corporations cannot serve as court-appointed receivers, George, a cash-basis taxpayer, was appointed in his individual capacity to serve as the receiver. George's receiver fees, which were negotiated with the interested parties and approved by the court at the start of the receivership, were paid on an

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[1] "A receiver is a court officer or representative appointed to take over the control and management of property that is the subject of litigation before the court, to preserve the property, and ultimately to dispose of it according to the final judgment." 6 WITKIN CAL. PROC. PROVISIONAL REMEDIES § 416 (4th ed. 2004).

interim basis during the administration of the receivership, usually monthly.

With respect to the present case, George served as the court-appointed receiver for five different stations: Reno Broadcasting (Reno) from October of 1990 to January of 1992, Royal Broadcasting (Royal) from May of 1991 until 1994, KXGO Radio Station from March of 1991 to December of 1992, Diamond Broadcasting (Diamond) from May 1993 to May of 1994, and JJN Broadcasting (JJN) in 1994. In addition to brokerage commissions and income from other sources, George was paid $90,001.42 in receiver fees in 1991, $125,432.66 in 1992, and $154,595 in 1993.[2] Tax returns for the 1991 and 1992 income were not filed until 1995. George never filed a return reporting the receivership income from 1993.

Nevertheless, when George refinanced the mortgage on his residence in March of 1994, he submitted copies of apparent tax returns for 1991 and 1992, listing the receiver fees as personal income for those years. George also submitted a Statement of Income and Expenses for 1993, listing receiver fees as his personal income. These returns turned out to be fraudulent documents fabricated by George for purposes of obtaining the refinancing of his mortgage.

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[2] The record indicates the disallowed $30,000 of expenses is fully reflected in the $154,595 of receiver fees paid in 1993. Final accountings for the Royal and Diamond receiverships required George to repay a total of $30,000 for disallowed expenses when these receiverships were closed by the court in 1994.

On January 13, 1995, the Internal Revenue Service (IRS) sent George a written inquiry regarding his 1991 and 1992 returns which had not been filed. George falsely responded that the returns had been filed in December of 1994. George also falsely responded to a subsequent IRS inquiry, asserting that the accounting firm of Antonini Professional Corporation was to have completed the returns, but that it went out of business and another firm was working on the returns. George later prepared the 1991 and 1992 returns himself, filing them on October 16, 1995. Neither George's returns nor his spouse's for 1991 and 1992 reported the receivership fees received during those years. No return was filed by George or his wife for tax year 1993. Finally, The Georges' 1994 joint tax return reported only $23,000 in receiver fees, in addition to income from other sources. These returns, though filed years after George was paid the receiver fees and approximately one year after the last receivership was approved by the court, failed to report $347,029.08 in receiver fees.

When an IRS revenue agent initially interviewed George regarding his 1991 and 1992 returns on July 16, 1996, George did not disclose his employment as a receiver and did not disclose the $90,001.42 of receiver fees from 1991 nor the $125,432.66 of receiver fees from 1992. During a second interview on February 28, 1997, George admitted he earned the receiver fees, but only after he was confronted with the fraudulent tax returns submitted to the lender in 1994 in support of his mortgage application. A referral for criminal prosecution soon followed.

II. Analysis

A. Clarity of the Law

George first argues that, as a matter of law, he lacked wilfulness to commit a crime because the law governing allocation of receiver fees was not clearly established at the time of the offense. The district court's determination that the predicate law was clearly established is a question of law which we review de novo. See United States v. Schulman, 817 F.2d 1355, 1358 (9th Cir. 1987) (citing United States v. Russell, 804 F.2d 571, 574 (9th Cir. 1986)).

The element of wilfulness cannot obtain in a criminal tax evasion case unless "the law clearly prohibited the conduct alleged in the indictment." Schulman, 817 F.2d at 1359; see also James v. United States, 366 U.S. 213, 221-22, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961) (vacating taxpayer's conviction for failure to report embezzled funds as income because conflicting caselaw rendered the predicate tax statute ambiguous when applied to embezzled funds). Without sufficient clarity in the law, taxpayers lack the "fair notice" demanded by due process so that they may conform their conduct to the law. United States v. Dahlstrom, 713 F.2d 1423, 1427 (9th Cir. 1983) (citing United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)). However, a lack of prior appellate rulings on the topic does not render the law vague, nor does a lack of previously litigated fact patterns deprive taxpayers of fair notice. See Russell, 804 F.2d at 575 (citing United States v. Ingredient Tech. Corp., 698 F.2d 88, 96 (2d Cir. 1983) (stating that it was "immaterial" that there was no prior litigation directly on point)). Thus, criminal prosecution is permissible when it is "clear beyond any doubt that [the conduct] is illegal under established principles of tax law. . . ." Russell, 804 F.2d at 575.

The general income allocation rule provides that "[t]he amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period." 26 U.S.C. § 451(a). The applicable regulations further clarify this general rule by identifying the respective duties for cash-basis and accrual basis taxpayers. "Under the cash receipts and disbursements method of accounting, such an amount is includible in gross income when actually or constructively received." 26 C.F.R. § 1.451-1(a).[3] Thus, as a cash-basis taxpayer, George would ordinarily be required to report income in the year it is received.[4]

According to George, the statute and regulations are ambiguous as to when receiver fees should be reported as gross income. George points to caselaw that purports to support his claim that receiver fees paid to a cash-basis taxpayer are not taxable until the time of final accounting and approval by the supervising court. According to George, the potential for subsequent

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[3] We no not reproduce other provisions of 26 C.F.R. § 1.451-1 dealing with allocations under the accrual method of accounting as they do not apply to cash-basis taxpayers like George. Likewise, we do not consider 26 C.F.R. § 1.451-2 applicable as this regulation is specific to the allocation of constructively-received income. The record shows that George actually received the fees.

[4] George has never claimed to be an accrual basis taxpayer.

disgorgement means that receiver fees are not received under a claim of right. See e.g., C.I.R. v. Indianapolis Power & Light Co., 493 U.S. 203, 209-10, 110 S.Ct. 589, 107 L.Ed.2d 591 (1990); American Valmar Int'l Ltd., Inc. v. C.I.R., 229 F.3d 98, 102 (2d Cir. 2000); Ahadpour v. C.I.R., 77 T.C.M. (CCH) 1210, 1999 WL 22639 (1999), 1999 Tax Ct. Memo LEXIS 9 at *16-17; Massey v. C.I.R., 143 F.2d 429, 430-31 (5th Cir. 1944); Parkford v. C.I.R., 133 F.2d 249, 250 (9th Cir. 1943); Helvering v. McGlue's Estate, 119 F.2d 167, 169 (4th Cir. 1941); C.I.R. v. Cadwalader, 88 F.2d 274, 274-75 (3d Cir. 1937).

George's reliance on these cases for such a proposition is misplaced. These cases simply suggest that receiver fees paid to cash-basis taxpayers are income in the year actually paid, and fees paid to accrual basis taxpayers are taxable in the year the applicable state law creates a right to demand the fees. Compare Cadwalader, 88 F.2d at 275 ("As 1930 was the year in which she in fact received the cash commission from the Roebling estate, that is the year in which the income was received and the tax upon its receipt due.") (cash-basis taxpayer), and Massey, 143 F.2d at 430-31 (holding attorney's receipt of cash payment for part of contingency fee taxable in the year actually received; remainder of fee not constructively received or taxable until settlement approved by the court) (cash-basis taxpayer), with McGlue's Estate, 119 F.2d at 169 (stating that an accrual method taxpayer ordinarily reports executor fees only when entitlement to them attaches under applicable state law, but death of the taxpayer triggers special provision of tax code allocating income as of the date of death despite lack of entitlement under state law), and Parkford, 133 F.2d at 250 (holding an accrual basis taxpayer who was not

a receiver need not report commission income for sale of a company which happened to be in receivership until the supervising court approved the sale).

Other cases cited by George provide that funds received while still subject to an express obligation to repay are not income. Unfortunately, these cases have little to do with the type of income at issue here: receiver fees. See e.g., Indianapolis Power & Light, 493 U.S. at 214, 110 S.Ct. 589 (stating deposits held by utility to secure payment from customers with poor credit was not income because the utility assumed an express obligation either to apply the deposits to customers' bills or to refund the balance); American Valmar, 229 F.3d at 102-03 (finding customer deposits held by international broker not income because the broker had an obligation to use the deposits for the customers' benefit or to repay them); Ahadpour, 1999 WL 22639, 1999 Tax Ct. Memo LEXIS 9 at *16-17 (holding earnest money advanced to sellers from escrow under the terms of a contract to sell real property was not income to the sellers in the year received because the contract created an express obligation to repay the funds if the sale did not close).

In contrast, two other cases specifically apply the claim of right doctrine to allocate executors' fees in the year they are received. In United States v. Merrill, 211 F.2d 297, 299 (9th Cir. 1954), a husband who was appointed as the executor of his wife's estate erroneously paid all of his executor fees out of his wife's segregated share of the community funds. We held that the entire $10,000 of executors' fees paid in 1939 were taxable to him under the claim of right doctrine despite the fact that $2,500 was repaid to the estate in a subsequent year due to the error. Id. at 303. Merrill therefore unambiguously applied the claim of right

doctrine to the receipt of trustee fees even though they were subject to final court approval and were partially repaid.

Similarly, the Second Circuit applied the claim of right doctrine to executors' commissions in Jacobs v. Hoey, 136 F.2d 954, 956-57 (2d Cir. 1943). The court held that such commissions were taxable in the year received, not in the year the supervising court conferred final approval. Of particular importance to the Jacobs court was the fact that the executor negotiated an arrangement with the beneficiaries that allowed advances against his ultimate commission. Because the interested parties had agreed in advance, "there was no reasonable likelihood that the [executor] would be called upon to return the sums that had been paid as commissions." Id. at 957. Rejecting the taxpayer's argument that the advance commissions should be treated as loans because they were subject to subsequent court approval and possible disgorgement, the Second Circuit held that the commissions were properly allocated to the taxpayer under the claim of right doctrine in the years they were actually paid. Id. at 956.

We conclude that the law clearly required George, a cash basis taxpayer, to report the receiver fees in the years he received them. We find 26 U.S.C. § 451 and the applicable cash-basis provision of 26 C.F.R. § 1.451-1 free from ambiguities regarding allocation of George's income. As stated in the regulation, "[u]nder the cash receipts and disbursements method of accounting, such an amount is includible in gross income when actually or constructively received." 26 C.F.R. § 1.451-1(a).

The fact that George's receiver fees were subject to possible disgorgement at the time of a subsequent final

accounting does not remove them from the claim of right doctrine. To the contrary, George's fees were taxable in the year received "even though it may [have been] claimed that he [was] not entitled to retain the money, and even though he may[have been] adjudged liable to restore its equivalent." N. Am. Oil Consolidated v. Burnet, 286 U.S. 417, 424, 52 S.Ct. 613, 76 L.Ed. 1197 (1932). Merrill and Jacobs confirm that executor fees and commissions are not exempt from the claim of right doctrine merely because they are subject to final court approval and possible disgorgement.[5] Likewise, the fact that some fees were actually repaid does not insulate the fees from the claim of right doctrine. See Merrill, 211 F.2d at 303; see also Rasmus v. C.I.R., 47 T.C.M. (CCH) 829, 1984 WL 15422 (1984), 1984 Tax Ct. Memo LEXIS 664 at *14 (holding funds misappropriated from estate by the administering attorney constituted income to the attorney in the year misappropriated despite subsequent repayment). These same principles apply to receiver fees like George's.

Short of an express obligation to repay, a contingent obligation to repay a portion of receiver fees actually

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[5] If anything, the fact that the courts supervising the receiverships approved George's fees demonstrates that he, like the executor in Jacobs, faced little threat of disgorgement. See People v. Riverside Univ., 35 Cal.App.3d 572, 587, 111 Cal.Rptr. 68 (1973) ("It is settled that fees awarded to receivers are in the sound discretion of the trial court and in the absence of a clear showing of an abuse of discretion, a reviewing court is not justified in setting aside an order fixing fees.").

paid to a cash-basis taxpayer does not remove these payments from the claim of right doctrine. See Merrill, 211 F.2d at 303-04. This is because "a potential or dormant restriction . . . which depends on the future application of rules of law to present facts, is not a 'restriction on use' within the meaning of [the claim of right doctrine]." Healy v. C.I.R., 345 U.S. 278, 284, 73 S.Ct. 671, 97 L.Ed. 1007 (1953). Indeed, application of the claim of right doctrine does not turn on the relative likelihood of a contingent obligation coming to fruition nor does it depend on the legitimacy of the taxpayer's right to retain the funds. See James, 366 U.S. at 219-20, 81 S.Ct. 1052 (stating illegally obtained funds are considered income and subject to the claim of right doctrine). Instead, the relevant inquiry centers on the taxpayer's dominion and control of the funds, see Indianapolis Power & Light, 493 U.S. at 212, 110 S.Ct. 589, and the manner in which the taxpayer treats the funds, see Alexander Shokai, Inc. v. C.I.R., 34 F.3d 1480, 1485 (9th Cir.1994). "A taxpayer receives a payment under a claim of right when he treats the payment 'as belonging to him.' "Id. (quoting Healy, 345 U.S. at 282, 73 S.Ct. 671).[6]

In sum, the district court correctly determined that the claim of right doctrine applied to George's receiver fees. The law on this point was sufficiently clear to allow prosecution for failure to report such fees in the years received.

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[6] Taxpayers who are eventually called upon in a subsequent year to repay funds acquired under a claim of right are entitled to an offsetting deduction in the year of repayment. See Alexander Shokai, 34 F.3d at 1485; see also 26 U.S.C. § 1341(a).

B. Good Faith Defense

George next argues that because he held a good faith belief the receiver fees were not taxable until the year in which the final accountings were approved and the receiverships were closed by the supervising courts, the evidence was insufficient to support his conviction. When preserved in the district court through a motion for acquittal as it was in this case, we review a challenge to the sufficiency of the evidence de novo. See United States v. Carranza, 289 F.3d 634, 641 (9th Cir. 2002) (citing United States v. Munoz, 233 F.3d 1117, 1129 (9th Cir. 2000)). In this review, we examine the evidence in the light most favorable to the government and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original) (citing Johnson v. Louisiana, 406 U.S. 356, 362, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)).

Willfulness is an element of making and filing a false tax return. See 26 U.S.C. § 7206(1). To establish the requisite level of willfulness, the government must prove "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek v. United States, 498 U.S. 192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). The government cannot carry this burden without negating the defendant's claim that he was ignorant of the law, that he misunderstood the law, or that he held a good-faith belief his conduct did not violate the law. Id. at 202, 111 S.Ct. 604. Good faith reliance on a qualified tax accountant is a defense to willfulness. See United

States v. Bishop, 291 F.3d 1100, 1106-07 (9th Cir. 2002).

Viewing the evidence in the light most favorable to the government, we conclude the government met its burden to prove willfulness, including its burden to negate George's good faith defense. The government presented overwhelming evidence at trial which proved that the vast majority of the receiver fees paid to George were never reported on any tax return. The government's evidence showed that two of the receiverships (Reno and Diamond) were closed in 1992, yet George did not report the receiver fees from these receiverships on his 1992 returns. This is fundamentally inconsistent with George's good faith defense that he was waiting until the receiverships were closed to report the income. Furthermore, the government's evidence showed that in 1994, the year the other receiverships closed, George failed to report the vast majority of the other receiver fees paid to him in 1991 and 1992. Based on this, a rational trier of fact could have concluded that there was no good faith on George's part.

Additionally, prosecution witness Orlando Antonini testified his firm was never retained by George to prepare his individual income tax returns. This testimony undermined George's claim that he relied on personal advice from Antonini in deciding not to report the fees until the receiverships were closed. Notably, defense counsel never asked Antonini whether he personally advised George to report the receiver fees on his personal returns in the year that the court approved the final accounting of the receivership, as opposed to the year the fees were actually received. George was the sole witness who testified to that effect, and the jury apparently found his testimony to be less

than credible. Thus, we reject George's good faith defense.

C. Jury Instructions

George claims that the district court committed reversible error when it adopted a claim of right jury instruction and rejected his proposed contingent payment jury instruction. We review the district court's rejection of the defendant's proffered instructions de novo when this decision is based on a question of law. See United States v. Eshkol, 108 F.3d 1025, 1028 (9th Cir. 1997) (citing United States v. Duran, 59 F.3d 938, 941 (9th Cir. 1995)). Whether the claim of right doctrine applies to receiver fees is a question of law. See Alexander Shokai, 34 F.3d at 1485. While a defendant is entitled to an instruction that adequately addresses his theory of defense, he is not entitled to an instruction that misstates the law. See United States v. Hicks, 217 F.3d 1038, 1045 (9th Cir. 2000) (rejecting defendant's proffered instructions because, among other things, they "were not legally accurate").

The district court gave the following instruction:

> Defendant is a cash-basis taxpayer. For a cash-basis taxpayer, income must be included as gross income on his federal income tax returns for the taxable year in which the income is actually received by the taxpayer. Income is actually received by a taxpayer when it is actually reduced to his possession. If a cash-basis taxpayer is paid income by check, the check constitutes income to the cash-basis taxpayer when he receives it. Income deposited

> in the taxpayer's bank is actually reduced to the taxpayer's possession.

George's proffered instruction would have added that income is not reduced to the taxpayer's possession "if the receipt is . . . subject to substantial limitations or restrictions." George's proffered instruction went on to state: [o]ne substantial limitation or restriction includes the receipt of the income by a trustee or receiver subject to later court approval of the amount received. In such circumstances, the income is not considered received until the court provides its final approval and is considered received and is to be reported in the tax year in which the court approval is obtained even though monies were actually received and used by the trustee or receiver at an earlier time.

We conclude the district court committed no error in rejecting George's proffered jury instruction. George's instruction misstated a cash-basis taxpayer's duty to report income in the year received, see 26 C.F.R. § 1.451-1(a), and ignored the long-settled principle that income is taxable in the year received "even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." N. Am. Oil, 286 U.S. at 424, 52 S.Ct. 613.

D. Motion for New Trial

George seeks a new trial based on the receivership returns for Royal and Diamond which he alleges were newly discovered after trial. George claims these receivership returns, which are entirely separate from his personal tax returns, show that prosecution

witness Orlando Antonini presented material testimony that was incorrect, misleading, and false.

This court reviews a denial of a motion for new trial based upon newly discovered evidence for an abuse of discretion. See United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991) (citing United States v. Lopez, 803 F.2d 969, 977 (9th Cir. 1986)). To prevail on a motion for new trial based upon newly discovered evidence, the defendant must show (1) the evidence is newly discovered; (2) failure to discover the evidence sooner was not due to lack of diligence; (3) the evidence was material to trial issues; (4) the evidence was not cumulative or merely impeaching; and (5) a new trial, if granted, would probably result in acquittal. See id.; see also FED. R. CRIM. P. 33.

We are not persuaded that the district court abused its discretion in denying George's motion for a new trial. George's failures to subpoena Antonini before trial or contact the California State Franchise Tax Board to obtain copies of the radio stations' state returns suggest that George was not diligent.

Moreover, the newly discovered evidence was not material. At trial, the prosecution called Antonini to testify for the purpose of showing that George never retained Antonini to prepare George's 1991 and 1992 personal tax returns, contradicting George's testimony that he relied on Antonini's advice to delay reporting receivership fees until the receiverships were closed. Antonini did testify that his firm performed bookkeeping work for George's receiverships and may have prepared tax returns for them, but when defense counsel presented Antonini with unsigned copies of the Royal Broadcasting returns, Antonini refused to state that his firm prepared them because the copies lacked

any indicia of identification. We acknowledge that, had the newly acquired receivership returns been presented to Antonini at trial, Antonini would have been forced to admit that his firm prepared them. Still, this concession would not have bolstered George's claim that Antonini advised George not to declare receiver fees on his personal tax returns. It would have only established a collateral point-who prepared the receiverships' returns.

Next, assuming *arguendo* that the new returns partially impeached Antonini's credibility, this would not merit a new trial. See Kulczyk, 931 F.2d at 549 (stating "evidence that would merely impeach a witness cannot support a motion for a new trial"). Given the lack of materiality and George's apparent credibility problem, it is unlikely the new evidence would have resulted in an acquittal for George. Thus, we affirm the district court's denial of George's motion for a new trial.

E. Sentencing

George contends the district court erred when it included tax losses for fiscal year 1994, and tax losses attributable to George's spouse from 1991-1993, as relevant conduct for the purposes of determining George's total tax losses under the United States Sentencing Guidelines (U.S.S.G.). He cites United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to support his position.

A probation officer prepared a presentence investigation report (PSR) which included tax losses from fiscal year 1994, and tax losses attributable to George's spouse from 1991-1993, in calculating total

tax losses of $145,685 incurred as a result of George's illegal conduct. This amount of tax loss corresponded to an offense level of 15. The district court considered but ultimately disregarded the recommendation contained in the PSR. Instead, the district court simply accepted the total tax loss amount stipulated to by the parties i.e., tax losses of "more than $70,000 but less than $120,000, resulting in a base offense level of 14 pursuant to U.S.S.G. § 2T4.1 (1994)." George's sentence was therefore not based upon any judicial factfinding; his sentence was based on tax losses to which George admitted in the stipulation, and no Sixth Amendment issue exists.

The absence of a Sixth Amendment violation, however, is not the end of our inquiry. See United States v. Stafford, 416 F.3d 1068, 1077 (9th Cir. 2005) ("While it appears that the facts upon which the obstruction of justice enhancement was based were admitted by the defendant, we nonetheless follow Ameline's 'limited remand' approach."). "[D]efendants are entitled to limited remands in all pending direct criminal appeals involving unpreserved Booker error, whether constitutional or nonconstitutional." United States v. Moreno-Hernandez, No. 03-30387, 419 F.3d 906, 917, 2005 WL 1964483, at *8 (9th Cir. August 17, 2005).

On the record before us, we cannot determine whether the district court would have imposed a materially different sentence under a discretionary sentencing regime. Accordingly, we remand George's sentence in accordance with United States v. Ameline, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc).

III. Conclusion

George's conviction is affirmed, but this case is remanded to the district court to review the sentence in accordance with Ameline.

AFFIRMED in part and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RANDOLPH GEORGE,

Defendant

No. CR 01-00326 MMC

May 19, 2004

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MAXINE M. CHESNEY

UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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Therefore, pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Randolph George, is hereby committed to the custody of the Bureau of Prisons to be that for a

term of 15 months. This term consists of 15 months on Counts 1 and 2, 12 months on Count 3, all to be served concurrently.

Upon release of imprisonment, the defendant shall be placed on supervised release for a term of 1 year on Counts 2 through 3, all concurrently.

Within 72 hours of release from custody, the defendant shall report in person to the probation office in the district to which he's released;

While on supervised release the defendant shall not commit another federal, state, or local crime. He shall be prohibited from owning a firearm or other dangerous devices and shall not possess controlled substance.

In addition, he shall comply with standards of supervised release and also the following special ones:

He's to pay any fine, restitution, special assessment imposed by the judge; and shall submit his person, residence, vehicle or any property under his control to a search if conducted by United States Probation Officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of possession of contraband or evidence of a violation of a condition of release.

****

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RANDOLPH GEORGE, Defendant - Appellant.	No. 06-10275 D.C. No. CR-01-00326--MMC Northern District of California, San Francisco ORDER

Before: HUG, BRUNETTI, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc and Judges Hug and Brunetti have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED JUL - 2, 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, RANDOLPH GEORGE, Defendant.	NO. CR-01-0326-FMS STIPULATION RE BASE OFFENSE LEVEL UNDER SENTENCING GUIDELINES

IT IS HEREBY STIPULATED AND AGREED, by and between the plaintiff, the United States of America, by and through its counsel, Assistant United States Attorney David L. Denier, and the defendant, Randolph George, by and through his counsel, Marcus S. Topel and Daniel F. Cook, that for purposes of sentencing only, and based upon this Court's prior rulings on tax allocation and tax loss issues, the tax loss under U.S.S.G. § 2T1.1 is more than $70,000 but less than $120,000, resulting in a base offense level of 14 pursuant to U.S.S.G. § 2T4.1, (1994).

IT IS FURTHER STIPULATED AND AGREED that the defendant, Randolph George, in entering into this stipulation based upon the Court's prior rulings on tax allocation and tax loss issues, disputes this Court's decisions already made on tax allocation and tax loss issues, and fully reserves his right to appeal all tax allocation and tax loss rulings made previously by this Court or based upon this stipulation.

IT IS SO ORDERED

MAXINE M. CHESNEY

MAXINE M. CHESNEY

UNITED STATES DISTRICT JUDGE

DATE April 20, 2004

18 U.S.C. § 3553(a)

(a) *Factors To Be Considered in Imposing a Sentence.*— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any

amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

26 U.S.C. § 7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 U.S.C. § 7206

Any person who -

(1) *Declaration under penalties of perjury*

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) *Aid or assistance*

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) *Fraudulent bonds, permits, and entries*

Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) *Removal or concealment with intent to defraud*

Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any

goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) *Compromises and closing agreements*

In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully -

(A) *Concealment of property*

Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) *Withholding, falsifying, and destroying records*

Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

No. 07-529

In the Supreme Court of the United States

RANDOLPH GEORGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the plain-error standard to petitioner's sentencing claim under *United States* v. *Booker*, 543 U.S. 220 (2005).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Blakely v. *Washington*, 542 U.S. 296 (2004) 2, 4
Gall v. *United States*, No. 06-7949 (Dec. 10, 2007) 5
Rita v. *United States*, 127 S. Ct. 2456 (2007) 10, 11
Rodriguez v. *United States*, 545 U.S. 1127 (2005) 13
United States v. *Ameline*:
376 F.3d 967 (9th Cir. 2004) 4
408 F.3d 646 (9th Cir. 2005) 4
409 F.3d 1073 (9th Cir. 2005) 2, 5, 6, 8
United States v. *Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005) 12
United States v. *Booker*, 543 U.S. 220 (2005) ... 2, 5, 10, 11
United States v. *Coles*, 403 F.3d 764 (D.C. Cir. 2005) 6
United States v. *Combs*, 470 F.3d 1294 (9th Cir. 2006), petition for cert. pending, No. 07-6958 (filed Oct. 5, 2007) 8, 9, 10
United States v. *Crosby*, 397 F.3d 103 (2d Cir. 2005) 6
United States v. *Hughes*, 401 F.3d 540 (4th Cir. 2005) .. 12
United States v. *Mares*, 402 F.3d 511 (5th Cir.), cert. denied, 546 U.S. 828 (2005) 12

Cases—Continued: Page

United States v. *Moreno-Hernandez*, 419 F.3d 906 (9th Cir. 2005) 7
United States v. *Paladino*, 401 F.3d 471 (7th Cir.), cert. denied, 546 U.S. 849 (2005) 6, 11, 12
United States v. *Pirani*, 406 F.3d 543 (8th Cir.), cert. denied, 546 U.S. 909 (2005) 12
United States v. *Robinson*, 503 F.3d 522 (6th Cir. 2007) 12
United States v. *Rodriguez*, 398 F.3d 1291 (11th Cir.), cert. denied, 545 U.S. 1127 (2005) 12, 13
United States v. *Williams*, 475 F.3d 468 (2d Cir. 2007) 11

Constitution and statutes:

U.S. Const. Amend. VI 4, 5
18 U.S.C. 3553(a) 7, 8
18 U.S.C. 3553(b)(1) 5
18 U.S.C. 3742(e) (2000 & Supp. V 2005) 5
26 U.S.C. 7206(1) 2
26 U.S.C. 7203 2

In the Supreme Court of the United States

No. 07-529

RANDOLPH GEORGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-23a) is reported at 420 F.3d 991. The opinion of the district court (Pet. App. 3a-4a) is unreported. The post-remand opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 226 Fed. Appx. 771.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2007. A petition for rehearing was denied on July 2, 2007 (Pet. App. 26a). The petition for a writ of certiorari was filed on October 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of two counts of filing false income tax returns for 1991 and 1992 (Counts One and Two), in violation of 26 U.S.C. 7206(1), and one misdemeanor count of willful failure to file an income tax return for 1993 (Count Three), in violation of 26 U.S.C. 7203. Pet. App. 5a. Petitioner was sentenced to concurrent terms of 15 months of imprisonment on Counts 1 and 2 and 12 months of imprisonment on Count 3, to be followed by one year of supervised release. The court also imposed a $20,000 fine and $125 in special assessments and ordered payment of $70,000 in restitution. Pet. App. 5a-6a, 24a-25a.

While petitioner's direct appeal was pending, this Court decided *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). The court of appeals affirmed petitioner's convictions but ordered a limited remand of petitioner's case pursuant to *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc) (*Ameline II*). On remand, the district court determined that it would not have imposed a materially different sentence had it known that the Sentencing Guidelines were advisory. The court of appeals affirmed. Pet. App. 1a-4a, 21a-23a.

1. Between 1990 and 1994, petitioner served as a court-appointed receiver for five financially troubled radio stations. Pet. App. 6a-7a. His fees, which were negotiated with the interested parties and approved by the court at the start of the receivership, were paid on an interim basis during the administration of the receivership, usually monthly. *Ibid.* In addition to brokerage commissions and income from other sources, petitioner

was paid $90,001.42 in receiver fees in 1991, $125,432.66 in 1992, and $154,595 in 1993. *Id.* at 7a. Petitioner did not file tax returns reporting the 1991 and 1992 receivership income until 1995, and petitioner never filed a return reporting the receivership income from 1993. *Ibid.* Petitioner's returns for 1991, 1992, and 1994 failed to report a total of $347,029.08 in receiver fees. *Id.* at 7a-8a.

In July 1996, an Internal Revenue Service agent interviewed petitioner regarding his 1991 and 1992 returns. Petitioner did not disclose to the agent his employment as a receiver or the receiver fees he had received in 1991 and 1992. Pet. App. 8a. During a second interview in February 1997, petitioner admitted earning the receiver fees, but did so only after he was confronted with a fraudulent tax return—which listed the receiver fees as petitioner's personal income—that petitioner had submitted to a lender in 1994 in support of a mortgage application. *Ibid.*

2. On August 30, 2001, a grand jury sitting in the Northern District of California returned an indictment charging petitioner with two counts of willfully making and subscribing false income tax returns, in violation of 26 U.S.C. 7206(1), and one count of willful failure to file an income tax return, in violation of 26 U.S.C. 7203. On November 13, 2002, after a jury trial, petitioner was found guilty of all counts. 04-10307 Gov't C.A. Br. 2-3.

3. On May 19, 2004, the district court sentenced petitioner pursuant to the then-mandatory Sentencing Guidelines. 06-10275 Gov't C.A. Br. 3. The Presentence Investigation Report calculated total tax losses of $145,685, which resulted in an offense level of 15. The district court rejected that recommendation and instead accepted a stipulation between petitioner and the

government that the tax loss was "more than $70,000 but less than $120,000, resulting in a base offense level of 14." Pet. App. 22a, 27a. Petitioner's resulting Guidelines range was 15 to 21 months. The district court denied petitioner's motion for a downward departure based on extraordinary family circumstances. The district court sentenced petitioner to concurrent terms of 15 months of imprisonment on the false return counts and 12 months of imprisonment on the failure to file count, to be followed by one year of supervised release. The court imposed a $20,000 fine and ordered payment of $70,000 in restitution and $125 in special assessments. Petitioner raised no objection to the district court's application of the then-mandatory Sentencing Guidelines. *Id.* at 5a-6a; 06-10275 Gov't C.A. Br. 3-7.

4. On appeal, petitioner challenged the sufficiency of the evidence supporting his convictions, the correctness of the district court's jury instructions, and the district court's denial of his motion for new trial. 04-10307 Pet. C.A. Br. 10-35, 45-53. With respect to sentencing, petitioner challenged the district court's tax-loss calculation and claimed that the district court's determination of tax loss violated the Sixth Amendment. Petitioner relied on two then-recent decisions: *Blakely* v. *Washington*, 542 U.S. 296 (2004) (holding that the Sixth Amendment was violated by enhancement of a sentence based on judicial fact finding under a state determinate-sentencing scheme), and *United States* v. *Ameline*, 376 F.3d 967 (9th Cir. 2004) (holding that *Blakely*'s reasoning applied to the federal Sentencing Guidelines), amended and superseded on reh'g, 400 F.3d 646, amended and superseded on reh'g en banc, 409 F.3d 1073 (9th Cir. 2005). Petitioner did not challenge the district court's denial of his motion for a downward departure or argue

that his sentence was unreasonable. 04-10307 Pet. C.A. Br. 36-45; 06-10275 Gov't C.A. Br. 7.

5. While petitioner's appeal was pending, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicially found facts under mandatory federal Sentencing Guidelines. *Id.* at 226-244. To remedy that Sixth Amendment problem, *Booker* made the Guidelines "effectively advisory." *Id.* at 245. It did so by severing and excising 18 U.S.C. 3553(b)(1), which made the Guidelines mandatory, and 18 U.S.C. 3742(e) (2000 & Supp. V 2005), which "set[] forth standards of review on appeal" and "contain[ed] critical cross-references" to Section 3553(b)(1). *Booker*, 543 U.S. at 259-260. The Court ruled that federal sentences would be reviewed for "unreasonable[ness]." *Id.* at 261 (brackets in original). See *Gall* v. *United States*, No. 06-7949 (Dec. 10, 2007), slip op. 3.

The Court recognized that *Booker* would apply to all cases on direct review. *Booker*, 543 U.S. at 268. The Court also stated that it did not "believe that every appeal will lead to a new sentencing hearing," because it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid.*

6. In *Ameline II*, *supra*, the Ninth Circuit addressed the application of the plain-error standard of review to unpreserved *Booker* error. The Court held that a defendant shows constitutional "error" that is "plain" when a sentencing judge enhances a sentence "in reliance upon judge-made findings under the then-mandatory guidelines." 409 F.3d at 1078. The "more vexing"

inquiry was the third prong of plain-error review: whether and how a defendant would carry the burden of showing that his substantial rights were affected by the error. *Ibid.* The Ninth Circuit "surmise[d] that the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory." *Id.* at 1079. The court of appeals thus held:

> [W]hen we are faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory. If the district court responds affirmatively, the error was prejudicial and failure to notice the error would seriously affect the integrity, fairness and public reputation of the proceedings. The original sentence will be vacated by the district court, and the district court will resentence the defendant. If the district court responds in the negative, the original sentence will stand, subject to appellate review for reasonableness.

Id. at 1074-1075.[1]

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[1] The Second, Seventh, and District of Columbia Circuits also employ a limited remand procedure as part of their plain-error review of unpreserved *Booker* errors. See *United States* v. *Crosby*, 397 F.3d 103, 120 (2d Cir. 2005); *United States* v. *Paladino*, 401 F.3d 471, 483-484 (7th Cir.), cert. denied, 546 U.S. 849 (2005); *United States* v. *Coles*, 403 F.3d 764, 769-771 (D.C. Cir. 2005).

7. On August 23, 2005, the court of appeals affirmed petitioner's convictions and rejected petitioner's argument that the district court's tax loss calculation was based on judicial factfinding. Because the court could not "determine whether the district court would have imposed a materially different sentence under a discretionary sentencing regime," however, the court ordered a limited remand pursuant to *Ameline II*. Pet. App. 21a-23a. See *United States* v. *Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (holding that *Ameline II* remand is warranted in cases of both constitutional and nonconstitutional unpreserved *Booker* error).

8. On remand, the district court received written submissions from the parties and, on April 12, 2006, held a hearing. Petitioner renewed his challenge to the district court's original calculation of the applicable Guidelines range. 06-10275 Gov't C.A. Br. 8. The district court observed that the *Ameline II* remand had "the limited purpose of determining what [the court] would do now that the Guidelines are advisory." *Id.* at 9. The district court considered the evidence in the record, the arguments of counsel, the advisory sentencing Guidelines, and all of the factors provided in 18 U.S.C. 3553(a). The court stated that it did not "consider the Guidelines calculations to be presumptive. The Guidelines are a factor, and [the court] considered them with all of the other factors set forth in [Section] 3553." 06-10275 Gov't C.A. Br. The district court then assessed the mitigating factors raised by petitioner—his family circumstances, his history, and his characteristics. The court also considered the fact that it "would be prepared to find by any standard that's required, including beyond a reasonable doubt, that [petitioner] was not truthful on the [witness] stand." *Id.* at 10. The court announced that it was

"satisfied that the sentence that was imposed at the time [of the original sentencing] was the appropriate sentence in this case." *Ibid.* The court confirmed that it had "considered all of the factors and the advisory system in which we now operate." *Ibid.*

9. The court of appeals affirmed. Pet. App. 1a-2a.

a. The court first determined (Pet. App. 2a) that its review was governed by *United States* v. *Combs*, 470 F.3d 1294 (9th Cir. 2006), petition for cert. pending, No. 07-6958 (filed Oct. 5, 2007). In *Combs*, the Ninth Circuit reviewed a district court's decision to reinstate its original sentence following an *Ameline II* remand. The court noted that "[a]t no time during his first appeal did defendant challenge the reasonableness of his sentence," and that its ruling "applies only to defendants in Combs's particular situation." 470 F.3d at 1295.

As to such defendants, the court further noted that it was required to consider an issue of first impression: "[b]y what standard do[es] [the court] review a district court's determination, made during the course of an *Ameline* remand, that it would have imposed the same sentence under an advisory Guidelines system?" *Combs*, 470 F.3d at 1296. The court observed that the only guidance on that issue provided by *Ameline II* was its statement that "the original sentence will stand, subject to appellate review for reasonableness." *Ibid.* (quoting *Ameline II*, 409 F.3d at 1074-1075). The court did not interpret that language in *Ameline II* to require the same "reasonableness review [that the court] conduct[s] on post-*Booker* sentences," because "[s]uch full-blown reasonableness review presupposes that the judge sentenced defendant under a post-*Booker* regime, where the judge must take into account all the factors enumerated in" 18 U.S.C. 3553(a). *Combs*, 470 F.3d at 1296.

The court noted that a "*limited Ameline* remand * * * does not contemplate that the district judge will engage in a full post-*Booker* resentencing, *unless* he first determines that the sentence would have been materially different under an advisory Guidelines system." *Id.* at 1296-1297. If the district court determines that the same sentence would have been imposed, the court wrote, "defendant's plain error claim will have failed for lack of prejudice, and defendant would not seem entitled to review of his sentence at all." *Id.* at 1297.

Because *Ameline II* nevertheless "allows for appeal of the re-imposed sentence and instructs [the court] to review that sentence for 'reasonableness,'" the court of appeals held in *Combs* that the standard to be applied is: "Whether the district judge properly understood the full scope of his discretion in a post-*Booker* world." *Combs*, 470 F.3d at 1297. The court explained that a district court's determination that it would have imposed the same sentence under an advisory Guidelines system is meaningful only if the judge "understood his powers and responsibilities under [that] system." *Ibid.* The court noted that "[a] more demanding inquiry would turn every *Ameline* remand into a full-blown resentencing, and would thus be contrary to *Ameline*'s central holding that defendants whose sentences are being reviewed for plain error are entitled only to a limited remand." *Ibid.*

b. Applying *Combs*, the court of appeals noted that, during the limited remand hearing in petitioner's case, the sentencing judge had stated:

> The purpose [of the remand] is to determine at this time whether the court would impose or should impose a sentence in some significant way different from the sentence that was imposed earlier . . . . I think I made it clear—if I need to say so—I want to

> make clear that I won't consider the guidelines calculations to be presumptive. The Guidelines are a factor.

Pet. App. 2a. The court of appeals concluded that the district judge "understood her discretionary powers under an advisory Guidelines system" and that the district judge's "decision to retain the original sentence was reasonable." *Ibid.* (quoting *Combs*, 470 F.3d at 1297).

ARGUMENT

Petitioner raises two challenges to the manner in which the court of appeals applied plain-error review to defaulted sentencing claims under *United States* v. *Booker*, 543 U.S. 220 (2005). The transitional issues that petitioner raises are of rapidly diminishing importance, as the transitional cases to which they apply have virtually all been resolved. Further review is therefore not warranted.[2]

1. Petitioner contends (Pet. 7-9) that the court of appeals erred by failing to review the substantive reasonableness of his sentence. He argues that the court's failure to do so conflicts with *United States* v. *Booker*, *supra*, and *Rita* v. *United States*, 127 S. Ct. 2456 (2007). That contention lacks merit and does not warrant review.

Neither *Booker* nor *Rita* addressed the manner in which plain-error review should be applied to unpreserved claims of *Booker* error. In *Booker*, the Court announced the "reasonableness" standard of review that would apply to federal sentences prospectively but also

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[2] The same issues are presented in the petition for writ of certiorari in *Combs* v. *United States*, No. 07-6958 (filed Oct. 5, 2007).

made clear that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Booker*, 543 U.S. at 268. *Booker* did not explain how courts should apply the plain-error test in this context. See *United States* v. *Paladino*, 401 F.3d 471, 484 (7th Cir.) (noting that this Court in *Booker* "made no ruling, express or implied," on the proper standard of plain-error analysis), cert. denied, 546 U.S. 849 (2005). And in *Rita*, the Court reviewed a post-*Booker* sentence and determined that appellate courts conducting "reasonableness" review may apply a presumption of reasonableness to a sentence imposed within a properly calculated Guidelines range. *Rita*, 127 S. Ct. at 2459. *Rita* did not address the plain-error standard at all. Thus, petitioner's argument (Pet. 8-9) that the court of appeals' decision conflicts with *Booker* and *Rita* is without merit.

2. Nor is review warranted based on petitioner's contention (Pet. 5-7) that the Ninth Circuit's decision, which followed *Combs*, conflicts with decisions of other circuits that employ a limited remand procedure in connection with plain-error review. It is true that the Second and Seventh Circuits have reviewed the substantive reasonableness of sentences reaffirmed in a limited remand and have not held that a defendant's failure to challenge the reasonableness of his sentence in an initial appeal forecloses such review. See *United States* v. *Williams*, 475 F.3d 468, 476 (2d Cir. 2007) (noting that challenge to the reasonableness of the length of a sentence "usually" is not ripe for review until after a limited remand and that law of the case "usually" will not prevent a defendant from obtaining reasonableness review of length of sentence on appeal following limited remand);

Paladino, 401 F.3d at 484 (where sentencing court reimposes original sentence in limited remand, sentence will be affirmed "provided that" it is reasonable).[3] But even assuming a conflict exists among these courts, review is not warranted.

In the wake of *Booker*, the courts of appeals have adopted varying approaches to reviewing unpreserved claims of *Booker* error. For example, rather than ordering a limited remand, some circuits have held that, when the reviewing court cannot determine from the original record whether the sentencing error was prejudicial, the defendant has not carried his burden under the plain-error test and is not entitled to relief. See *United States* v. *Antonakopoulos*, 399 F.3d 68, 80 (1st Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 521-522 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Pirani*, 406 F.3d 543, 552 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005); *United States* v. *Rodriguez*, 398 F.3d 1291, 1301 (11th Cir.), cert. denied, 545 U.S.

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[3] Petitioner also cites *United States* v. *Robinson*, 503 F.3d 522 (6th Cir. 2007), and *United States* v. *Hughes*, 401 F.3d 540 (4th Cir. 2005), but those cases are distinguishable. The limited remand in *Robinson* was not ordered in the context of plain-error review of an unpreserved *Booker* claim. Instead, the remand was ordered before *Booker* was decided, and its purpose was to permit the district court to make factual findings in support of aspects of its Guidelines calculation. *Robinson*, 503 F.3d at 526. While the case was on remand, *Booker* was decided. The district court therefore "resentence[d] Robinson in accordance with *Booker*." *Id.* at 527-528. In that context, the court ruled that the defendant "ha[d] not waived his right to raise *Booker* claims," and it reviewed the substantive reasonableness of the resulting sentence. *Id.* at 528-531. In *Hughes*, the Fourth Circuit, applying plain-error review, vacated the defendant's sentence and remanded for a full post-*Booker* resentencing. *Hughes*, 401 F.3d at 545. On the pages of the opinion to which petitioner cites (Pet. 6), the court merely recited the "reasonableness" standard of review announced in *Booker*. *Id.* at 546-547.

1127 (2005). This Court, however, has repeatedly declined to resolve the circuit conflict on the broader issue of the proper application of the plain-error test to *Booker* error. See, *e.g.*, *Rodriguez* v. *United States*, 545 U.S. 1127 (2005). There is no reason, therefore, for the Court to address a narrower issue within that same area, *i.e.*, the post-remand standard of review that should be applied by the subset of circuits that employ a limited remand procedure.

Review is particularly unwarranted now. The issue presented is of little current and progressively diminishing importance because it involves the standard to be applied by appellate courts in reviewing sentences originally imposed before *Booker*. The limited remand procedure should rarely or never occur in cases in which sentence was imposed after *Booker* because district courts are now treating the Guidelines as advisory, and any treatment of them as mandatory would almost certainly elicit an objection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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79

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IN THE

Supreme Court of the United States

RANDOLPH GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

THE STANDARD OF REVIEW FOR *BOOKER* ERROR IS OF SIGNIFICANT AND NOT DIMINISHING IMPORTANCE. 2

A. The Courts Of Appeals Have Taken Conflicting Approaches To Substantive Reasonableness Review. 2

B. The Ninth Circuit's Refusal To Apply Serious Substantive Reasonableness Review Conflicts With This Court's Recent Decisions. 3

C. The Question Presented Is Not Limited To "Transitional" Concerns. 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Gall v. United States,
128 S. Ct. 586 (2007) 4, 5

Kimbrough v. United States,
128 S. Ct. 558 (2007) 5

Rita v. United States,
127 S. Ct. 2456 (2007) 5

United States v. Booker,
543 U.S. 220 (2005) ..... *passim*

United States v. Combs,
470 F.3d 1294 (9th Cir. 2006) 1, 7

United States v. George,
420 F.3d 991 (9th Cir. 2006) 2, 3

United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 3, 4

United States v. Williams,
475 F.3d 468 (2d Cir. 2007) 2, 4

REPLY BRIEF FOR PETITIONER

Faced with a clear split among the circuits, the government attempts to avoid this Court's review by casting the question presented in this Petition as a narrow, transitional issue. Opp. at 13. To the contrary, the Petition raises the broader and substantial question of the contours of the substantive reasonableness standard of review articulated in *United States v. Booker*, 543 U.S. 220 (2005), and discussed in recent Court decisions.

The government concedes that the Ninth Circuit's decision below deepened a circuit split on the question of what standard the appellate courts should apply when reviewing the reasonableness of sentences re-imposed after *Booker*, acknowledging that "the courts of appeals have taken different approaches to reviewing unpreserved claims of *Booker* error." Opp. at 12. This circuit split concerns the Court's holding in *Booker* that a substantive reasonableness standard was to be applied to all sentences imposed in cases that were pending on direct review at the time *Booker* was decided. 543 U.S. at 268. A majority of the circuit courts that have considered the issue has held that such reasonableness review requires that, if a district court elects on post-*Booker* remand to adhere to the originally imposed sentence, the appellate court will review the sentence for substantive reasonableness—the same substantive reasonableness standard to be applied in all *Booker* cases.

In contrast, the Ninth Circuit's opinion below, applying its decision in *United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006), held that in certain cir-

cumstances its review is limited to "[w]hether the district judge properly understood the full scope of [her] discretion in a post-*Booker* world." *Id.* at 1297, *quoted in United States v. George*, 420 F.3d 991, 1001-02 (9th Cir. 2006). Neither *Booker* nor a majority of circuit courts contemplates this anemic standard of appellate review, which denies defendants the right to have a court of appeals review the substantive reasonableness and thus the constitutionality of their sentences.

This Petition presents the opportunity for the Court to clarify the meaning of substantive reasonableness review under *Booker* and to harmonize the circuit split acknowledged by the government. Despite the government's attempt to cast the decision below as isolated and transitional, the question presented in this Petition is one of national and pressing importance, and warrants review.

THE STANDARD OF REVIEW FOR *BOOKER* ERROR IS OF SIGNIFICANT AND NOT DIMINISHING IMPORTANCE.

A. The Courts Of Appeals Have Taken Conflicting Approaches To Substantive Reasonableness Review.

As even the government concedes, Opp. at 12, the Ninth Circuit's decision below conflicts with the majority of the circuits to have considered the scope of reasonableness review for sentences re-imposed post-*Booker*. *See United States v. Williams*, 475 F.3d 468 (2d Cir. 2007) (applying full substantive reasonableness review and singling out the Ninth Circuit for being out of step with the majority). Contrary to the government's attempt to narrow the dispute to in-

consequential proportions, whether the *Booker* claim is preserved or unpreserved, the question dividing the circuits is undeniably important: what does the substantive reasonableness standard articulated in *Booker* require a court to consider on appellate review? *See United States v. Paladino*, 401 F.3d 471, 484 (7th Cir.), cert. denied, 546 U.S. 849 (2005) ("[T]he mere reimposition of the original sentence does not insulate it from appellate review under the new [*Booker*] standard.").

As the Petition shows, the Ninth Circuit has answered that fundamental question in a radically different manner than other circuits. Under the current circuit split, criminal defendants in certain circuits are afforded substantially different appellate rights—varying from a robust reasonableness review of the substance of the sentence to no substantive review at all. *Compare Paladino*, 401 F.3d at 484 (applying the substantive reasonableness review applicable to all *Booker* cases), *with George*, 420 F.3d at 1001-02 (reviewing only to ascertain whether the sentencing court understood the scope of its discretion after *Booker*). Such a high degree of variance among the circuits is particularly troubling when it occurs with respect to an issue as fundamental as the Sixth Amendment. The issue underlying this circuit split warrants review.

B. The Ninth Circuit's Refusal To Apply Serious Substantive Reasonableness Review Conflicts With This Court's Recent Decisions.

The government appears to rest its argument against certiorari on the fact that this case arose in the context of plain-error review. *See* Opp. at 10-11. Review for plain error, however, is an "ordinary pru-

dential doctrine" that frames, rather than supplants, the substantive reasonableness review required to ensure that federal sentencing decisions comply with the Sixth Amendment. *See Booker*, 543 U.S. at 268 (holding that substantive reasonableness is the standard of appellate review to be applied to all cases pending on direct review at the time *Booker* was decided, while also noting that "ordinary prudential doctrines" such as the plain-error test remain applicable). As the Second and Seventh Circuits have held, the plain-error test will insulate certain sentences from reversal "*provided that the sentence is reasonable, the standard of appellate review prescribed by Booker.*" *Paladino*, 401 F.3d at 484 (emphasis added); *Williams*, 475 F.3d at 474 ("We hold here that we review a sentence for reasonableness even after a District Court declines to resentence pursuant to [post-*Booker* remand].") The Ninth Circuit's abdication of its duty to apply substantive reasonableness review, as this Court directed in *Booker*, is inconsistent with *Booker* itself.

In addition, the Ninth Circuit's interpretation of reasonableness review is inconsistent with the description of such review contained in recent cases. While it is true, as the government notes, that *Booker* does not explain how courts should apply plain-error analysis to post-*Booker* sentencing claims, Opp. at 11, the Court has suggested the contours of the substantive reasonableness review to be applied prospectively as well as to all cases pending on direct review at the time *Booker* was decided. All of these cases appear to call for a more robust substantive reasonableness review than that applied by the Ninth Circuit. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007) (explaining that the appellate

court must review a sentencing decision for substantive reasonableness, taking into account the "totality of the circumstances"); *Kimbrough v. United States*, 128 S. Ct. 558, 576 (2007) (noting that the "ultimate question" was whether Kimbrough's sentence was reasonable, that is, whether the district court abused its discretion in determining the length of Kimbrough's sentence); *Rita v. United States*, 127 S. Ct. 2456, 2463-64 (2007) (finding that, while appellate courts may apply a presumption of reasonableness to district court sentences that are within the properly calculated sentencing range, this presumption was not binding and appellate courts should continue to determine the reasonableness of the sentence). The substantive reasonableness review applied by the Second and Seventh Circuits accords with this Court's description in *Booker* and its progeny. The truncated review provided by the Ninth Circuit in this case does not.

There is no reason to be found in this Court's case law why the robust reasonableness review articulated in the Court's post-*Booker* decisions should not apply in plain-error cases. By looking only to whether the district court understood the full scope of its post-*Booker* discretion, the Ninth Circuit has abandoned any meaningful reasonableness review. The plain-error context does not excuse appellate courts from applying the substantive reasonableness review required by this Court to ensure compliance with the Sixth Amendment.

C. The Question Presented Is Not Limited To "Transitional" Concerns.

The government attempts to smooth over the circuit split and the inconsistencies between the deci-

sion below and recent Court precedent by characterizing this Petition as raising merely "transitional" concerns. Opp. at 10. This attempt fails for several reasons.

As a threshold matter, the question presented affects *at the very least* all *Booker* claims reviewed for plain error. This will not necessarily be a small class of cases. As Justice Scalia noted in his concurring opinions in both *Gall* and *Rita*, the Court's conclusion that the Federal Sentencing Guidelines were purely advisory does not in all cases protect against sentences based on additional judge-found facts. Because "the Court has not foreclosed as-applied constitutional challenges to sentences....[t]he door remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 128 S. Ct at 602-603 (Scalia, J., concurring). It is inevitable that some of these as-applied constitutional claims will not be perfectly preserved for appeal. Accordingly, the intersection of plain-error analysis and the substantive-reasonableness standard of review articulated in *Booker* will continue to divide the federal courts of appeal beyond the initial period of transition from a mandatory to advisory Guideline system. The appellate standard of review for unpreserved sentencing claims remains a live and pressing issue.

In addition, while certiorari would be warranted even if the question related solely to unpreserved claims of *Booker* error, the facts of this case illustrate that the Petition does not concern purely unpreserved error: Mr. George challenged the

reasonableness of his sentence in the first instance (although not, of course, in terms of *Booker*, which had not yet been decided). Moreover, even if the Ninth Circuit had correctly viewed Mr. George's sentencing claims as unpreserved, there is no support for the Ninth Circuit's decision that different standards of substantive review apply to defendants who challenge the reasonableness of their sentences on direct appeal and those who did not. *See Combs*, 470 F.3d at 1299 (Berzon, J., dissenting) (noting that the *Combs* majority drew an unauthorized distinction between those who questioned the reasonableness of their sentences on appeal, and those, like Combs, who did not).

Finally, this Petition presents an issue of great importance because review here would allow the Court to clarify the contours of the reasonableness review *Booker* set forth as the governing standard. As recently noted, because the Court did not precisely define reasonableness review, the standard is open to varying interpretations. *Gall*, 128 S. Ct. at 603-04 (Alito, J., dissenting) ("The *Booker* remedial opinion did not explain exactly what it meant by a system of 'advisory guidelines' or by 'reasonableness' review, and the opinion is open to different interpretations."). The Ninth Circuit's decision below, and the circuit split it fostered, illustrate how this confusion over reasonableness review has resulted in divergent approaches to appellate review that negatively reflect on the fairness and uniformity of federal sentencing.

* * *

Contrary to the government's assertions, the question of what standard of review is to be applied

to claims of *Booker* error affects all sentencing cases, not just transitional ones, and thus is of great and lasting importance. The confusion over how *Booker*'s substantive reasonableness review is to be applied has resulted in conflicting approaches to sentencing review that will continue if the Court does not provide clarification. As evidenced by the Court's willingness to clarify other post-*Booker* points of law and procedure, *see, e.g.*, *Gall*, 128 S. Ct. at 597, *Rita*, 127 S. Ct. at 2463-64, the standards to be applied both to the initial surge of *Booker* claims and the normal flow of cases to come are sufficiently important to warrant review. Certiorari is warranted in this case because the Ninth Circuit's decision below not only conflicts with the majority of federal circuit courts that have considered the question presented, but is also out of step with this Court's post-*Booker* decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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